
**IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE DISTRICT OF UTAH, CENTRAL DIVISION**

ABOVE ALL SAND & AGGREGATE, LLC,
a Utah limited liability company,

Plaintiff/Counterclaim Defendant,

vs.

NELCON, INC., a Montana corporation,

Defendant/Counterclaim Plaintiff

NELCON, INC., a Montana corporation,

Third-Party Plaintiff,

vs.

PEYTON CANARY, an individual; DEAN
SMITH, an individual, GO AGGREGATES,
LLC, a Delaware limited liability company.

Third-Party Defendants.

**ORDER DENYING MOTION FOR
DEFAULT JUDGMENT WITHOUT
PREJUDICE**

Case No. 2:13-cv-00786

Judge Robert J. Shelby

Pursuant to Federal Rule of Civil Procedure 55(b), Defendant, Counterclaimant, and Third-Party Plaintiff Nelcon, Inc. moves the court to enter default judgment against Plaintiff and Counterclaim Defendant Above All Sand & Aggregate, LLC, and Third-Party Defendant Peyton Canary.¹ For the reasons stated below, the court denies the motion without prejudice.

On October 5, 2015, the court entered default against Above All Sand and Mr. Canary.² Nelcon now seeks a judgment in the amount of \$305,600.90 in damages for breach of contract, plus interest at the maximum rate of 10% per annum from the date of each invoice, or from the

¹ Dkt. 57.

² Dkt. 55–56.

date of the breach of contract, through January 20, 2016.³ Nelcon also seeks an award of attorneys' fees and costs through January 12, 2016.⁴ In total, Nelcon seeks a default judgment against Above All Sand and Mr. Canary, jointly and severally, in the amount of \$415,391.97.⁵

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default."⁶ That said, "[a] party is not entitled to a default judgment as of right."⁷ Rather, "[d]ecisions to enter judgment by default are committed to the district court's sound discretion."⁸

When it comes to awarding damages, Federal Rule 54(c) states that "[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings."⁹ Federal Rule 55(b) further provides that, "[i]f the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing."¹⁰ But "[i]n all other cases, the party must apply to the court for a default judgment."¹¹ In such cases, the court may conduct a hearing to "determine the amount of damages."¹² While the court has discretion to hold a hearing to determine damages,¹³

³ Dkt. 57.

⁴ *Id.*

⁵ *Id.*

⁶ Fed. R. Civ. P. 55(a).

⁷ *Villanueva v. Account Discovery Sys., LLC*, 77 F. Supp. 3d 1058, 1066 (D. Colo. 2015) (citation omitted) (internal quotation marks omitted).

⁸ *Olcott v. Del. Flood Co.*, 327 F.3d 1115, 1124 (10th Cir. 2003) (citation omitted) (internal quotation marks omitted); *see also Villanueva*, 77 F. Supp. 3d at 1066 (stating that "the entry of a default judgment is entrusted to the sound judicial discretion of the court" (citation omitted) (internal quotation marks omitted)).

⁹ Fed. R. Civ. P. 54(c).

¹⁰ *Id.* 55(b)(1).

¹¹ *Id.* 55(b)(2).

¹² *Id.*

¹³ *Villanueva*, 77 F. Supp. 3d at 1075.

the court need not hold a hearing “if the amount claimed is a liquidated sum or one capable of mathematical calculation.”¹⁴


In any event, the plaintiff bears the burden “to establish entitlement to recovery of damages against a defaulting defendant.”¹⁵ And “[a] default judgment for money damages must be supported by proof.”¹⁶ “This requirement ensures that a plaintiff is not awarded more in damages than can be supported by actual evidence.”¹⁷ Similarly, a party seeking attorneys’ fees must prove the amount of the fees and the reasonableness of the fees.¹⁸

Here, Nelcon has not submitted proof of its damages for breach of contract. For example, Nelcon has not submitted the contract showing that the requested amount of damages is a sum certain. Nor has Nelcon submitted an affidavit proving that the amount claimed is capable of mathematical calculation. Similarly, while Nelcon has submitted a declaration in support of its request for attorneys’ fees and costs, Nelcon has not established that it is entitled to attorneys’ fees in the first place.¹⁹

For the foregoing reasons, the court denies Nelcon’s motion for default judgment without prejudice.

SO ORDERED this 27th day of January, 2016.

BY THE COURT:


ROBERT J. SHELBY
United States District Judge

¹⁴ *Hunt v. Inter-Globe Energy, Inc.*, 770 F.2d 145, 148 (10th Cir. 1985).

¹⁵ *Bolsa Res., Inc. v. Martin Res., Inc.*, No. 11-cv-01293, 2014 WL 4882132, at *17 (D. Colo. Aug. 28, 2014) (citation omitted).

¹⁶ *Villanueva*, 77 F. Supp. 3d at 1075 (citing *Klapprott v. United States*, 335 U.S. 601, 611–12 (1949)).

¹⁷ *Id.*

¹⁸ *See Hunt*, 770 F.2d at 148.

¹⁹ *See, e.g.*, Utah Code Ann. § 78B-5-826.